Supreme Court, U.S.
FILED
96 468 SEP 13 1996
OFFICE OF THE CLERK

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, DAVID JACK WRIGHT, ET AL.,

Cross-Petitioners,

v.

K MART CORPORATION,

Cross-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act (the "ADEA") incorporates Section 256 of the Fair Labor Standards Act, 29 U.S.C. § 256, for purposes of determining when an action is commenced on behalf of opt-in plaintiffs?

2. Whether the "single filing," or "piggybacking," rule (which permits a plaintiff to assert an ADEA claim without first having filed a charge of discrimination with the Equal Employment Opportunity Commission) allows a plaintiff to "piggyback" on charges filed by persons other than original plaintiffs in the same case?

LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents and Cross-Petitioners before this Court:

Original Plaintiffs: Carl Helton, Charles W. Kempton, Nick Payne, James E. Taylor, and Bob Williams.

Intervenors and Opt-Ins: David Jack Wright, Mike Williams, Larry Good, Robert Windell, Robert Defoe, Robert Ennis, Edna Portilla, Roger Icenhour, Richard Allen Morris, Meredith T. Watkins, Stephen R. Freeman, Terry E. Dahl, Tony M. Arrington, Kenneth C. Bell, Ronald L. Braley, Mercer David Grayson, Edward J. Kondrad, James T. Mixon, David L. Navickas, Ricky D. Sallee, James L. Steadman, and John D. Thompson.

The following party was a Defendant below and is a Petitioner and Cross-Respondent before this Court:

K Mart Corporation.

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OPINIONS BELOW

The opinion of the court of appeals is published at 79 F.3d 1086. The opinion of the district court is reproduced as an appendix to the court of appeals' published opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The court of appeals denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Kmart filed a petition for certiorari on July 18, 1996. The Respondents/Cross-Petitioners filed a brief in opposition to that petition on August 12, 1996. The Respondents/Cross-Petitioners incorporate by reference the appendix contained in Kmart's petition.

STATUTES INVOLVED

1. 29 U.S.C. § 255(a):

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act--
>
> (a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the

> cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

2. 29 U.S.C. § 256:

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear — on the subsequent date on which such written consent is filed in the court in which the action was commenced.

3. 29 U.S.C. § 626(d):

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this titles applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

4. [Former] 29 U.S.C. § 626(e)(1):

> Sections 255 and 259 of this title shall apply to actions under this chapter.

STATEMENT OF THE CASE

Kmart Corporation v. Grayson, et al. (the "*Grayson*" case) and *Kmart Corporation v. Helton, et al.* (the "*Helton*" case) were originally two multi-plaintiff actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"). The complaints in both cases allege that the plaintiffs were victims of an age-motivated purge of Store Managers in Kmart's Southern Region that began in 1990, following a company-wide reorganization and the installation of a new Vice President of Kmart's Southern

Region.[1] The eleven original *Grayson* plaintiffs filed their complaint on January 17, 1992. The five original *Helton* plaintiffs filed their complaint on October 29, 1992.

On February 28, 1994, the *Helton* plaintiffs moved to amend their complaint to specify that the action was brought, under 29 U.S.C. § 216(b),[2] on behalf of the both named plaintiffs and others "similarly situated." The plaintiffs asked the district court to allow additional plaintiffs to "opt in" to the case if they fell within the proposed "class" definition:

> Each person who (1) was demoted from the position of General Store Manager of any store in Kmart's Southern Region at any time between January 1, 1990 and December 31, 1992, or who resigned from such a position during the same time period after being told that he or she would be demoted if he or she did not resign, and (2) was, at the time of the demotion or resignation, at least 40 years old.

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[1] Between 1990 and 1992, Kmart demoted approximately 151 Southern Region Store Managers and approximately 76 more resigned. This purge eliminated approximately one-third of all Store Managers in the Southern Region.

[2] Section 216(b) provides that:

> An action to recover the liability prescribed . . . may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The plaintiffs also asked the district court to order that notices be sent to all of the members of this class, informing them of their right to opt in as plaintiffs. *See Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989)(district court has discretion under ADEA to facilitate notice to potential opt-in plaintiffs).

The district court granted this motion in an order entered July 21, 1994. The eleven *Grayson* plaintiffs and ten other demoted Kmart Store Managers promptly filed notices opting in to the *Helton* case. The district court then certified its July 21 order for interlocutory appeal and the court of appeals granted leave to pursue the interlocutory appeal.[3]

The court of appeals affirmed Judge Shoob's class order, holding that "the plaintiffs have made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996).

At the same time, the court of appeals severely restricted the "temporal scope" of the opt-in class, based on the court's application of two limitations provisions governing the claims of opt-in plaintiffs. These were, *first*, the 3- year statute of limitations applicable to ADEA claims arising before November 21, 1991, and *second*, the 180- (or 300-) day charge filing requirement generally applicable to ADEA claims.

First, the court of appeals held that the ADEA implicitly incorporates Section 256 of the Fair Labor Standards Act, 29

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[3] While the appeal was pending, the Equal Employment Opportunity Commission sought and obtained permission from Judge Shoob to intervene in the *Helton* case under 29 U.S.C. § 626(b).

U.S.C. § 256.[4] Section 256 provides that FLSA actions are deemed commenced only when each individual plaintiff is either named in the complaint or files a written consent to become a party plaintiff. This ruling barred as untimely every opt-in notice that had been filed by a plaintiff subject to the 3-year limitations period. It also rendered pointless any efforts to notify (under *Sperling*) other potential plaintiffs demoted before November 21, 1991, as future opt-ins would of necessity be untimely.

Second, the court of appeals drastically limited the "single filing," or "piggybacking," rule. The rule permits class members to opt in as plaintiffs without having filed their own EEOC charges, by relying upon EEOC charges filed by others. The court of appeals held that opt-in plaintiffs could piggyback only on charges filed by original *Helton* plaintiffs. The court held that the earliest such charge had been filed by plaintiff Wayne Kempton on April 15, 1992. This ruling limited the "temporal scope" of the opt-in class to persons who had been demoted within 180 days prior to April 15, 1992 (or 300 days in deferral states).

On June 17, 1996, the Eleventh Circuit denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc. Kmart filed a petition for certiorari, which the plaintiffs have opposed. This conditional cross-petition is filed within 90 days of the Eleventh Circuit's order denying the motion for reconsideration. *See* Supreme Court Rule 13.

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[4] Section 256 codifies § 7 of the Portal-to-Portal Act.

REASONS FOR GRANTING THE WRIT

1. If Kmart's Petition Is Granted, This Court Should Resolve the Split Among the Circuits as to Whether the ADEA Incorporates § 256 of the FLSA.

The claims of ADEA plaintiffs demoted before November 21, 1991[5] are subject to the FLSA's 3-year statute of limitations. *See* 29 U.S.C. § 626(e), *incorporating* 29 U.S.C. § 255. For the original *Helton* plaintiffs, of course, the statute was satisfied, or tolled, by the filing of their complaint. The parties disputed, however, what action must occur in order to toll the statute for "opt-in" plaintiffs.

The court of appeals held that the ADEA incorporated 29 U.S.C. § 256, so that the limitations period applicable to each opt-in plaintiff's claim was not tolled until he filed an individual opt-in notice. The court conceded that § 256 was not expressly incorporated in the ADEA. Relying on *O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987), however, the court held that the ADEA implicitly incorporates § 256. 79 F.3d at 1105-07.

The court of appeals' decision directly conflicts with the rulings of two other circuits and the overwhelming majority of district courts to have faced the issue. These courts have reasoned that Congress' express incorporation of specific other portions of the FLSA should exclude implied incorporation of

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[5] The Civil Rights Act of 1991, which became effective November 21, 1991, substituted a requirement that the charging party file suit within 90 days of receiving notice that the EEOC had terminated its investigation of the plaintiff's charge. 29 U.S.C. § 626(e)(1991).

§ 256. *Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 363, 468-71 (3d Cir. 1994); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978)("Section 256 is not incorporated by reference into the ADEA and therefore we fail to see how it could be applicable to age discrimination suits."), *cert. denied*, 441 U.S. 906 (1979); *In Re Western District Xerox Litigation*, 850 F. Supp. 1079, 1093 (W.D.N.Y. 1994)("[T]olling commences for statute of limitations purposes for subsequently filed complaints, when the initial class action complaint was filed and not when class members opted into the certified class."); *Mooney v. Aramco Services Co.*, 764 F. Supp. 461, 462 (S.D. Tex. 1991)("The application of § 256 is refuted by the clear language of the ADEA."); *Levine v. Bryant*, 700 F. Supp. 949, 953 (N.D. Ill. 1988)("Congress did not intend for section 256 to apply to the ADEA."); *Vivone v. ACME Markets, Inc.*, 687 F. Supp. 168, 169 (E.D. Pa. 1988)("29 U.S.C. is not among the sections of the FLSA incorporated into the ADEA.") . *See also Sperling v Hoffmann-La Roche, Inc.*, 145 F.R.D. 357, 360-61 (D.N.J. 1992)(same).

Virtually all of the decisions rejecting implied incorporation of § 256 include, in support of their conclusion, this Court's admonition that Congress selectively incorporated only certain provisions of the FLSA into the ADEA:

> [I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

Lorillard v. Pons, 434 U.S. 575, 581 (1978).

Implied incorporation of § 256 would also be incompatible with this Court's decision in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989). *Sperling* approved a class notification process under which plaintiffs subject to the 3-year limitations period were permitted to file opt-in notices *more* than 3 years after the alleged discriminatory acts occurred.

In *Sperling*, the original plaintiffs had filed a complaint on behalf of themselves and a class of several hundred other employees who had been discharged or demoted in a 1985 reduction in force. The district court directed the employer to provide a list of names and addresses of potential class members. The members were to receive court-approved notices, informing them of the existence of the suit and their right to join as plaintiffs. In an interlocutory appeal (taken before the notices were actually sent), this Court approved the procedure. It reasoned:

> Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. . . .
>
> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

493 U.S. at 170.

Among the advantages of a court-managed notification process was the ability to set "cutoff dates" for opt-ins:

> Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action.

493 U.S. at 172.

Sperling was decided in 1989, some four years after the 1985 reduction in force. The notices had not yet been mailed to the class members. If the class members needed to have filed opt-in notices within three years of the alleged discrimination, the very notification process *Sperling* approved would have been meaningless, for by 1989 there would have been no viable claims left to assert via the opt-in process. There would have been no reason to speak of future "cutoff dates," 493 U.S. at 172.

It is hardly surprising that the Third Circuit, when the issue subsequently arose in *Sperling*, refused to follow the *O'Connell* rule and held that the filing of the class complaint tolled the statute for the entire class. *Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 363 (3d Cir. 1994). Indeed, it is hard to imagine how a district court could *ever* assure the completion of a class notification process within three years of the alleged discriminatory activity. If such a notification process is to be (a) meaningful and (b) orderly, it cannot occur while a statute of limitations is ticking away.

The circuit courts have split on the incorporation issue.[6] The Eleventh Circuit's decision overlooks the pronouncements of this Court and conflicts with the overwhelming majority of decisions by the lower courts. If Kmart's petition is granted, the Court should also take up the incorporation issue.

2. If Kmart's Petition Is Granted, This Court Should Resolve the Split Among the Circuits as to Whether an ADEA Plaintiff May "Piggyback" on Charges Filed by Persons Other than Original Plaintiffs in the Same Case.

The "single filing," or "piggybacking," rule allows a plaintiff to pursue a Title VII or ADEA action in court without first having filed a charge of discrimination with the EEOC.[7] The rule allows a plaintiff to rely ("piggyback") on a charge filed by someone else, where that charge alleges similar illegal activity. As the Sixth Circuit has recently noted, the *basic* rule is uncontroversial:

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[6] The contrast between the Eighth Circuit's 1987 *O'Connell* decision and the Third Circuit's 1994 *Sperling* decision can be viewed either as a split in the circuits or as an evolution of the law following this Court's 1989 *Sperling* ruling. The Eleventh Circuit's ruling either creates or deepens the division of authority.

[7] The ADEA normally requires an aggrieved individual to file an EEOC charge as a precondition to filing suit. 29 U.S.C. § 626(d).

> [T]he federal courts to address the issue have uniformly held that the [single filing] rule is applicable in the ADEA context. . . .

Howlett v. Holiday Inns, Inc., 49 F.3d 189, 194 (6th Cir. 1995).

In interpreting the single filing rule, the courts have looked to the underlying purpose of the charge filing requirement. The EEOC charge gives the employer notice of potential claims against it and affords the EEOC an opportunity to conciliate those claims. A charge that contains allegations of discrimination against a class of employees accomplishes this purpose for the entire class. Once notice has been given on behalf of the class, there is no reason to require each member to file a separate, duplicative, charge. The court of appeals acknowledged precisely this tenet:

> The purpose of the requirement that a plaintiff file an EEOC charge within 180 days (or 300 days in a deferral state) of the allegedly illegal act or practice is (1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed. *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1562-65 (11th Cir. 1988), *vacated on other grounds sub nom, Swint v. Pullman-Standard*, 493 U.S. 929, 110 S. Ct. 316, 107 L. Ed.2d 307 (1989). The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the "useless act of filing a

> charge." *See* Larson, *Employment Discrimination* § 102.35(b) at 21-276.29— 21-276.30. *See Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995) ("'It would be wasteful, if not vain for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.'") (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968)).

79 F.3d at 1102-03.

After stating this rule, however, the court of appeals then appended an illogical and overly technical corollary: it held that only a charge filed by an original plaintiff in the same case could be used for piggybacking.[8]

The court of appeals' ruling directly contradicts a decision by the Second Circuit, allowing an ADEA plaintiff to piggyback on a charge filed by a plaintiff in a *different* action. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990). The Second Circuit reasoned:

> The further question is whether the single filing rule may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as co-plaintiff or intervenor. If the single filing rule is to be available in non-class ADEA actions, we see no reason to limit its use to

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[8] This had the effect of excluding potential opt-in plaintiffs who were part of the 1990-92 purge, but did not happen to have been demoted within 180 or 300 days of a charge filed by an original *Helton* plaintiff.

> those electing to join preexisting lawsuits. The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit or initiate their own.

918 F.2d at 1057.

The Second Circuit was correct. The purpose of the charge is to afford notice and an opportunity to conciliate; that is accomplished *at the time the class charge is filed*. The charging party might end up in another civil action, might settle his case, or might never file suit at all. At best, these outcomes are random, and ought to be irrelevant to the question of whether the charge has accomplished its purpose. At worst, the power to control these outcomes allows an employer, a single charging party, or both to manipulate the fate of an entire class.[9]

The court of appeals' decision cannot be reconciled with the rationale of the single filing rule, particularly as it has been expressed in recent decisions by other circuits. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995); *Howlett v. Holiday Inns, Inc.* 49 F.3d 189, 194-96 (6th Cir. 1995). The split among the circuits is deepened by a Third Circuit decision rejecting *Tolliver* and holding that the single filing rule may be invoked in § 216(b) class actions, but not in

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[9] The employer can avoid the claims of hundreds or thousands of class members by settling with the charging party; all that is necessary is to settle early enough so that the charging party never becomes an "original plaintiff."

other ADEA cases. *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506-07 (3d Cir. 1995).

There clearly is discord among the circuits, and this case affords the Court an excellent opportunity to establish parameters of the single filing rule. *See Howlett*, 49 F.3d at 194 ("Controversy arises, though, over the test to use in determining whether an administrative charge will suffice to support piggybacking."). These issues are likely to presented repeatedly in class actions and other multi-plaintiff cases brought under the Federal employment discrimination laws.

CONCLUSION

If Kmart's petition for a writ of certiorari is granted, the cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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September 1996